IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 194

IN THE MATTER OF THE PROFESSIONAL CONDUCT OF THOMAS HART FISHER

BRIEF OF RESPONDENT THOMAS HART FISHER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

I.

The bankruptcy case in which this disciplinary proceeding had origin has been before the Court of Appeals for

the Seventh Circuit in three reported appeals in addition to the present case: *In re Joslyn's Estate,* 168 F. 2d 803 (1948); *In re Joslyn's Estate,* 171 F. 2d 159 (1948); and *Young* v. *Handwork,* 179 F. 2d 70 (1949), cert. den., 339 U.S. 949 (1950), reh. den., 339 U. S. 991 (1950). In each of these appeals the Court of Appeals reversed the District Court on points which we state in the argument are pertinent to this certiorari proceeding. The opinions reported in 168 F. 2d 803 and 171 F. 2d 159 and also the opinion of the Court in the present case (179 F. 2d 361) contain excellent statements of the factual background of this litigation, relevant to this proceeding. A reading of these opinions is necessary to a proper understanding of this certiorari proceeding, and will make unnecessary a recital here of many pertinent facts.

II.

On page 4 of the petition it is erroneously stated as a fact that Judge Campbell applied the rule followed in criminal cases, requiring proof of the charges beyond a reasonable doubt. The truth is that he stated that he would apply this rule but did not apply it.

III.

On page 5 of the petition it is stated as a fact that the Court of Appeals did not hold, or even intimate, in its opinion that the trial court had "abused its discretion or that it acted arbitrarily, capriciously or unreasonably in disciplining Fisher." This is erroneous. In the very next paragraph, through direct quotations from the Court of Appeals opinion, the petition shows that the Court of Appeals stated that the trial court based conclusions on facts which were "frivolous and of no legal consequence," some

of which constituted only "flimsy support" for the court's reasoning (179 F. 2d 361, 363, 368). As we show in the argument, the terms "capricious" and "frivolous" and "unreasonable" are synonymous, and therefore the Court of Appeals held that the trial court had acted "capriciously" and "unreasonably" in spite of the statements in the petition to the contrary. As examples in this connection we quote the following from the opinion (page references are to 179 F. 2d):

> P. 366—" . . . . We think the record furnishes no substantial basis for this reasoning or conclusion. . . . . "
>
> P. 367—"We have examined the evidence relied upon in support of this specification and the court's statement is, we think, more unfavorable to respondent than the evidence justifies. . . . . "
>
> P. 368—" . . . . An examination of these letters, however, to our mind furnishes not the slightest corroboration. . . . . "
>
> P. 369—"We have considered other numerous unprofessional acts charged against respondent but are not impressed with their importance. Any weight to which they are entitled is dependent upon the premise that respondent sought a compromise or settlement in the bankruptcy proceeding for his own financial advantage and consequently to the detriment of the bankrupt's creditors. The record, in our view, does not establish such premise and therefore such acts become insignificant."
>
> P. 370—" . . . a careful perusal of the record compels us to the conclusion that the order appealed from is not supported by that clear and convincing testimony which courts generally require in a matter of the instant character. . . . . "

IV.

In support of our argument we call the Court's attention to the following additional facts.

Subsequent to state court litigation between the bankrupt Joslyn and his divorced wife, in which respondent represented her, respondent learned facts indicating that the bankruptcy might have been fraudulent (R. 304, 306). He consulted the Referee in Bankruptcy to whom the proceeding had been assigned and asked his advice. The Referee urged him to bring the matter to the District Court's attention by a reopening petition (R. 451-5, 490-2, 494, 687, 688, 874-5). Respondent made a further investigation, determined to his satisfaction that the bankruptcy and discharge were fraudulent, and on behalf of the Benevolent and Protective Order of Elks, which was the largest creditor, filed and prosecuted the reopening petition (R. 494-9, 501, 534-5; Tr. No. 9377, p. 2). At no time did he represent Mrs. Joslyn in the bankruptcy proceeding, she being represented in it by other counsel (R. 94, 500-3; 168 F. 2d. 803, 804).

Solely through the ability, energy and perseverance of respondent, and against strong opposition (including that of Judge Barnes) it was established: 1) that the bankrupt had initiated and conducted the bankruptcy proceeding in bad faith and with intent to defraud creditors (Tr. No. 9377, p. 59; 171 F. 2d 159, 161, 164; 179 F. 2d 361, 369); 2) that the bankrupt had thrice committed perjury (Tr. No. 9377, pp. 57-8); 3) that the bankrupt's schedule of assets was false, omitting assets including interests under two trusts which the bankrupt himself later valued at $546,757.30 (Tr. No. 9377, pp. 57, 84; 168 F. 2d 803, 804); 4)

that the fraudulently omitted interests in the trusts were, as respondent has persistently contended, administrable assets, which should be brought into the court (R. 142, 505-6, 507-8, 531, 616, 628, 655-8, 800, 929-30, 932-3; Tr. No. 9377, pp. 281, 285, 411; *Young* v. *Handwork,* 179 F. 2d 70 (1949), cert. den., 339 U.S. 949 (1950), reh. den., 339 U.S. 991 (1950); and 5) that the fraudulent proceeding should be reopened (Tr. No. 9377, pp. 40, 68).

Over a period of eleven months before Judge Barnes instigated the disciplinary proceeding (February 18, 1946 -January 27, 1947) the Judge had evidenced a desire that the bankruptcy proceeding be settled; and for some time had been trying to induce counsel to settle the bankruptcy proceeding and to induce respondent to acquiesce in settlement (R. 899-900, 903, 907, 910, 915-917, 919-20, 929-30, 933-36, 938, 944-45, 950, 951, 952; Tr. No. 9377, pp. 282, 295; 179 F. 2d at p. 366). When he appointed the trustee in bankruptcy Judge Barnes told him that he wanted the case settled (R. 123, 130, 133). In fact Judge Barnes only reopened the fraudulent bankruptcy after saying to counsel, "Suppose I reopen and you forthwith made an offer of settlement?" (R. 917). On the day he entered the reopening order (Tr. No. 9377, p. 95) the bankrupt's counsel (who had opposed the application to reopen filed by respondent) asked leave to file a petition to reopen and filed a petition for leave to settle (R. 918). This proposition of settlement ($30,000) was opposed by both the respondent and the trustee in bankruptcy and was not accepted (R. 133, 930).

Another proposal of settlement was made on July 1, 1946; the amount being $40,000 and the offer being subject to the condition that state court liens be released (R. 932, 937, 942-3, 945).

Respondent opposed such a settlement as inadequate and based on illegal conditions, and because he thought the settlement should be made in the court after the court had taken over the fraudulently omitted assets (R. 933-4). Respondent had constantly urged that the assets be brought into the District Court (R. 142, 505-6, 507-8, 531, 616, 628, 655-8, 800, 929-30, 932-3; Tr. No. 9377, pp. 281, 285, 411); and that any settlement be made in and approved by that Court (R. 182-3, 500, 531, 548, 900-3, 905-7, 914, 916-7, 934-5; 179 F. 2d at pp. 365, 366, 367). On the other hand the attorneys for the bankrupt had tried to keep the assets out of the court and effect an out-of-court settlement (R. 184, 900, 901, 904-5, 907, 915, 957). Judge Barnes stated that he didn't care whether the settlement was in or out of court (R. 900); but never took over the assets.

That Judge Barnes was attempting to force a settlement over respondent's objections, is shown by the Court of Appeals opinions in 171 F. 2d 159, 162 and 179 F. 2d 361, 366. In the latter the Court says "Judge Barnes strongly favored a compromise and carried his insistence to a point difficult to justify." (P. 366).

Respecting adequacy of the amount for settlement, respondent constantly urged that no settlement should be made for less than would provide for full payment of the bankruptcy claims (R. 181, 182, 183, 200-1, 233, 309, 500, 531, 548, 819, 826, 828, 900, 901, 902, 903, 905, 906, 907, 914, 916, 917, 934-5; Tr. No. 9377, pp. 285-7, 327-330). If the court had taken over the fraudulently omitted assets there would have been enough to cover all claims, costs and expenses since the assets exceeded $500,000 and the total of claims, costs and expenses was about $200,000 (R. 158, 548, 737, 967; Tr. No. 9377, pp. 57, 84, 85, 96, 101; 179 F. 2d at p. 365).

Throughout the period during which Judge Barnes was seeking to force a settlement, he frequently displayed passion, prejudice and personal hostility toward respondent (Tr. No. 9377, pp. 281, 284-5, 328-9, 336, 338, 339, 365, 366, 397, 407, 415, 421, 426, 428, 430).

On January 16, 1947, Johnstone (who was then attorney for the trustee in bankruptcy) at a hearing before Judge Barnes, described to the court a new proposition for settlement and respondent declined to acquiesce in it immediately (R. 956-7). The proposition was conditioned on the summary adjudication or waiver of a lien claim of respondent (see *In re Joslyn's Estate*, 168 F. 2d 803); upon settlement of a state court litigation (R. 957); and upon the entry of a stipulation that the fraudulent bankrupt should have the right to present evidence and citations and procure an order of the court that he "at all times acted in good faith in these proceedings" and had "not been guilty of any misconduct" or "of any fraud" (R. 873). The proposed settlement had been negotiated in secret by Johnstone, without the knowledge of respondent or of Johnstone's client, the trustee in bankruptcy (R. 164, 234-244, 355, 435, 441-2, 970; 179 F. 2d 368). The Court of Appeals characterized the conditions attached to this proposed settlement as "such as to make it doubtful if any court would have approved" the settlement "even though it had been agreeable to all concerned" (179 F. 2d 368); and similarly stated with respect to the previous proposals of settlement also that the conditions attached to them "make it doubtful if they could have been properly approved even had respondent consented" (179 F. 2d 366).

At the hearing on January 16, 1947, after respondent

indicated that he would not immediately acquiesce in the settlement (R. 957), Judge Barnes said to him (R. 960-1):

> "And I am beginning to wonder about this case. I am just wondering if about the time I suggested to these parties that they ought to compose their differences, you didn't begin to throw monkey wrenches into the machinery. Now I am getting to think that you are the one who has been throwing monkey wrenches into the machinery because there is so much that has happened."

At a hearing on January 23, 1947, the following colloquy occurred (R. 970-971):

> "By Mr. Fisher: I don't think—
>
> "By the Court: Just a minute.
>
> "I will be glad to hear from you on those matters presently.
>
> "At the same time, in the future I will be glad to hear from you on the question of what if any disciplinary action should be taken, what should be done in respect of the contempt—the contempt which has been charged has been exhibited by you throughout these proceedings."

On the succeeding day (January 24, 1947) the following colloquy took place (R. 971-2):

> "By The Court: If I did not know your propensity for getting around things and twisting—
>
> "By Mr. Fisher: The court apparently does not feel friendly.
>
> "By the Court: I do not feel otherwise than I should feel after having had experience with you for a couple of years.
>
> "By Mr. Fisher: We have differed over one important subject, and that is, is it proper to force this kind of settlement this way in this sort of a case.
>
> "By the Court: No, we have not differed about that. What we have really differed about is as to

whether you should have a very large sum of money from the bankrupt estate in order to aid you to get paid in the divorce case, that is out of the bankrupt estate which you were supposedly looking after, so that you could get more money. That is the way I view it.*

"By Mr. Fisher: There is enough funds here to pay everybody; on that basis there is no conflict in interest.

"By the Court: Oh, I heard that story.

* * *

"By the Court: The question of what, if any, punishment should be imposed, by way of contempt or otherwise for the conduct which the court has observed on the part of Mr. Fisher, I want to take that up; I don't want to do it at the present time, but I want to do it, and I don't want to forget it."

Judge Barnes at this hearing entered the order which was reversed in *In re Joslyn's Estate*, 168 F. 2d 803, on the ground that the court had exceeded its jurisdiction (Tr. No. 9377, p. 166). This order directed respondent to dismiss his lien claim; restrained him from prosecuting it; recited that the claim was "hereby dismissed"; and ordered respondent to pay to the trustee in bankruptcy $5,320 which he had received from Mrs. Joslyn in repayment of money he had loaned her. It also restrained and enjoined respondent "from in any way interfering or attempting to interfere, by engineering appeals in the name of other persons, or otherwise, with the consummation of the settlement presented pursuant to the Petition of the Bankrupt filed herein January 23, 1947" (Tr. No. 9377, p. 167).

* The Court of Appeals later: 1) held that the District Court had no right to adjudicate the lien claim which was the basis of this comment by Judge Barnes (**In re Joslyn's Estate**, 168 F. 2d 803); and 2) held that respondent had not been guilty of any improper conduct in regard to the claim (179 F. 2d 361, 366).

At a hearing on January 27, 1947 Judge Barnes entered two additional orders against respondent, one initiating this disciplinary proceeding (R. 3), and the other initiating a proceeding for criminal contempt (R. 898-9) which was not prosecuted.

Before January 16, 1947, nothing had occurred to indicate that any such charges would be brought against respondent (R. 525). Johnstone, who had previously been friendly to respondent and even called on him for help (R. 149-58, 166, 445-60, 518-25, 946-7), turned suddenly against him when he declined to approve the settlement, and attacked respondent savagely in an attempt to force him to join in the settlement (R. 958-66; Tr. No. 9377, pp. 197-9).

Johnstone, the man who had tried to effect the illegal settlement negotiated secretly, and who had signed the stipulation with the fraudulent bankrupt, was appointed by Judge Barnes to prosecute respondent (R. 3, 85, 86; 179 F. 2d 361, 362, 368). Johnstone did prosecute respondent (R. 75), and he alone. The District Attorney was appointed additional counsel September 22, 1948 (R. 728), more than a year after the trial ended (April 22, 1947; R. 643, 715).

ARGUMENT.

I. The Court Lacks the Jurisdiction Invoked.

This Court lacks the invoked jurisdiction because the petition was not filed by a "party to any civil case" as required by Title 28, United States Code, Sec. 1254 (1), under which petitioners invoke the jurisdiction of this Court. That section provides that cases in courts of appeals may be reviewed by this Court by writ of certiorari only when granted "upon the petition of any party to any civil or criminal case." Neither of the petitioners (Kerner or Johnstone) is or ever was a party to this case. Petitioner Johnstone was directed by Judge Barnes to make available for the purposes of the hearing (on the order to show cause) material and relevant documents, books, papers and testimony (R. 3). He alone prosecuted the matter before Judge Campbell (R. 86). Mr. Kerner (who here petitions individually and not in his official capacity as United States Attorney) was appointed additional counsel in his capacity as United States Attorney, over a year after the conclusion of the trial (R. 728). Since petitioners are not parties to this case, it is clear that they have no standing to prosecute this proceeding.

Louisiana v. *Jack*, 244 U.S. 397 (1917).

Ex parte Leaf Tobacco Board of Trade, 222 U.S. 578 (1911).

South Carolina v. *Wesley*, 155 U.S. 542 (1895).

Guion v. *Liverpool, London & Globe Ins. Co.*, 109 U.S. 173 (1883).

Payne et al. v. *Niles et al.*, 20 How. 219 (U. S. 1857).

On the cover of the petition, but not in the petition itself, two of the four so-called "Counsel for Petitioners," (i. e., Messrs. Kerner and Johnstone) are described as the petitioners "on behalf of the United States District Court for the Northern District of Illinois." The quoted phrase is merely descriptive, for it is not contended that the United States District Court (singular)is a party in this Court. On the contrary, Messrs. Kerner and Johnstone are obviously the so-called "Petitioners" (plural) for whom they and the other two individuals signing the petition are purportedly acting as "Counsel."

No showing is attempted in the petition to explain how the two individuals, Messrs. Kerner and Johnstone, are entitled to invoke the jurisdiction of this Court by the filing of the petition herein. If it be contended that, in the appeal to the Court of Appeals, the Government was appellee, by Mr. Kerner as United States Attorney, with two assistant United States attorneys and petitioner Johnstone as associates (179 F. (2d) 361, 362), and that the Government is the proper party to prosecute this proceeding, the obvious answer is that the Government is not a petitioner here.

Directly to the contrary, the Solicitor General of the United States has advised Mr. Kerner and the District Court that "he did not deem the circumstances surrounding this case to be such as to warrant participation in the disbarment proceeding by the United States." (See "*Application for Extension of Time Within Which to File Petition for a Writ of Certiorari*" heretofore filed with this Court by Mr. Kerner individually, a copy of which is attached as an Exhibit, at pp. 33-4 hereof, with the significant portion printed in black-faced type on p. 34).

We therefore respectfully urge that this Court lacks the jurisdiction which petitioners seek to invoke under Sec. 1254(1) of Title 28, United States Code, and that the petition should be dismissed for this reason.

II. Petitioners Misstate the Holding of the Court of Appeals. That Court did not Review Conflicting Evidence. It merely held that as a Matter of Law the Evidence Did Not Support the Conclusions Drawn by the District Court or the Disbarment Order.

The "Questions Presented" (Petition, p. 2) and the "Specifications of Errors to be Urged" (Petition, p. 6) both show a misconception of this case. The Court of Appeals did not substitute its findings, conclusions or discretion for those of the District Court. It held that *as a matter of law* the evidence (which petitioners recognize was uncontroverted as to pertinent facts*) did not support the findings or conclusions of the District Court, or the disbarment order.

That the Court of Appeals did not review factual findings but merely reviewed the legal inferences therefrom is shown not only by petitioners' acknowledgment that there were no significant factual issues* but by the following statement of the Court of Appeals in its opinion (179 F. 2d at p. 370):

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*Note: On page 2 of the petition it is stated that the Court of Appeals acknowledged specifically that there was "no dispute as to the evidentiary facts." On pages 4-5 it is stated that the Court of Appeals "acknowledged that there was no dispute as to the evidence". We are willing to accept these assertions, but in frankness wish to point out that they are not precisely correct. The Court of Appeals recognized that there was one issue of fact (whether or not a certain conversation had occurred) but held correctly that the issue was not pertinent because, even accepting in full the evidence adverse to respondent, it did not support the trial court's finding (179 F. 2d at pp. 362, 367-8).

> " . . . . As we said in the beginning, the heart of the controversy does not reside in a dispute as to the evidentiary facts but rather in the conclusions drawn therefrom, and in all deference to Judge Campbell, whom the record indicates gave careful consideration to the matter, we are of the opinion that the conclusions which he reached and upon which his order is predicated are erroneous."

The action of the Court of Appeals was the proper exercise of the function of an appellate tribunal in determining whether or not as a matter of law, upon the evidence, the disbarment order was erroneous, and whether or not the trial court exercised its discretion lawfully.

United States v. *Gypsum Co.*, 333 U.S. 364, 394-5 (1948).

Farmers Loan and Trust Co., Petitioner, 129 U. S. 206, 215-6 (1889).

Orvis v. *Higgins*, 180 F. 2d 537 (C.A.2d 1950).

III. The Court of Appeals in Reality Held That the District Court Had Abused Its Discretion.

The entire petition is based upon the erroneous proposition that the Court of Appeals, although it held that the trial court based its order on matters which were "frivolous and of no legal consequence," and constituted "nothing more than flimsy support" for the order, nevertheless did not hold that the trial court acted "arbitrarily, capriciously or unreasonably."

It is not, and we believe cannot be, shown how the Court of Appeals could hold that the disbarment order was based on such evidence without holding in effect that the trial court had "acted arbitrarily, capriciously and unreasonably."

In Roget's "Thesaurus," a leading authority upon the

subject, the words "frivolous" and "capricious" and "unreasonable" are classified as synonymous (1933 ed., p. 498-9).

The Oxford English Dictionary defines the word "frivolous" as follows:

> "Frivolous—1. Of little or no weight, value or importance; paltry, trumpery; not worthy of serious attention; having no reasonable ground or purpose.
>
> "b. *Law.* In pleading: Manifestly insufficient or futile.
>
> "2. Characterized by lack of seriousness, sense, or reverence; given to trifling, silly."

In 37 C.J.S. 1382, the word "frivolous" is defined as "Given to triflings, not worth notice. The term has reference to materiality rather than to truth or falsity."

In *Commander Milling Co.* v. *Westinghouse E. & M. Co.*, 70 F. (2d) 469, 473 (C. A. 8th 1934), the court defined a "frivolous" pleading as one which on its face is so manifestly insufficient that the court upon bare inspection can determine its effect without argument.

Since the phrase "frivolous and of no legal consequence," which is used by the Court of Appeals in describing the trial court's abuse of discretion in its opinion in this case (179 F. 2d 361 at p. 363), is a term of greater opprobrium than the phrase "arbitrarily, capriciously or unreasonably," and since the petition itself concedes that the Court of Appeals had the right to reverse the trial court if "it acted arbitrarily, capriciously and unreasonably in disciplining Fisher," then it necessarily follows that the entire basis for the petition is without merit and that the Court of Appeals has in fact properly acted within the scope of its power to review the action of the trial court in this case.

The Court of Appeals correctly held: 1) that the evidence did not support the trial court's findings; 2) that the trial court itself failed to find any evil intent, bad faith or injury to innocent persons; and 3) that the disbarment order was therefore erroneous (179 F. 2d 361, at pp. 366-370).

This was a determination that the trial court abused its discretion, just as clearly as though these words had been used in the opinion, in addition to the synonyms "frivolous," and "flimsy" actually used by the Court.

Cohen v. *Young*, 127 F. 2d 721 (C.A. 6th 1942).

Quinn v. *Gardner*, 32 F. 2d 772 (C.A. 8th 1929).

1 C.J.S. 403.

In *Cohen* v. *Young*, 127 F. 2d 721, 726 (C. A. 6th 1942), in holding refusal to hear evidence pertinent to a stockholders' action to be an abuse of discretion, the court said:

> " . . . . The exercise of discretion does not permit the court to disregard the substantive principles of law established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence."

In *Quinn* v. *Gardner*, 32 F. 2d 772 (C. A. 8th 1929), the Court of Appeals referred to the discretionary powers of a bankruptcy court in the course of a bankruptcy proceeding and then said that "abuse of discretion" in fact means "errors of law." At page 774 the court said (italics ours):

> ". . . . General orders made in a bankruptcy court are usually discretionary. This must be so. The peculiar facts and circumstances arising in bankruptcy cases necessitate the exercise of discretion on the part of the referee and judge in making the necessary orders. The appellate courts generally adhere to the rule that they will not interfere with these discretionary orders unless there is an abuse of such discretion. *Whether it be termed 'abuse of discretion,' or 'improvident exercise thereof,' the meaning is the same, namely an error of law.*"

At 1 C.J.S. 403-404 the definition of "abuse of discretion" includes the following: "clear error of law in the circumstances; clearly erroneous conclusion and judgment—one that is clearly against the logic and effect of such facts as are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; decision based upon incompetent or insufficient evidence; discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence; . . . error of law; . . . manifest error."

Since, as the Court of Appeals held, there is not a single specification which is both valid in law and sustained by the evidence, it is, we submit, clear that the trial court abused its discretion within the legal meaning of that term.

We believe one instance alone shows abuse of discretion sufficient to justify the reversal of the disbarment order. The trial court completely ignored the fact, demonstrated by the facts summarized in part IV of our Statement of the Case (See pp. 5-10 above), that the disciplinary proceeding was instigated and prosecuted for the purpose of inducing the respondent to fall in line and acquiesce in the illegal settlement. The proposed settlement: 1) would have forced respondent to either waive his lien or acquiesce in its summary adjudication although the District Court had not taken jurisdiction of the fraudulently unscheduled assets (see *In re Joslyn's Estate*, 168 F. 2d 803, *Nixon* v. *Michaels*, 38 F. 2d 420, 423 (C. A. 8th 1930), *Cline* v. *Kaplan*, 323 U. S. 97, 99 (1944)); 2) released the fraudulent bankrupt upon payment of $45,000 whereas the omitted assets totaled over $500,000 and the claims and expenses some $200,000, *Weil* v. *Neary*, 278 U. S. 160 (1929); *United States* v. *Dunkley*, 235 Fed. 1000 (D. C. N. D. Calif. 1916); 3) illegally required the settlement of a state court suit as

a condition, *Hamilton-Brown Shoe Co.* v. *Berwald Shoe Co.*, 10 F. 2d 275 (C. A. 5th 1925), cert. den., 271 U. S. 671 (1926); and 4) illegally exculpated the bankrupt from his fraud and perjury, *In re Rosenblatt*, 153 Fed. 335 (D. C. E. D. Pa. 1907), *In re Levy*, 127 F. 2d 62 (C. A. 3rd 1942). To disbar the respondent in this situation was a clear abuse of discretion.

Judge Campbell was without doubt influenced by the passion, prejudice and personal hostility of Judge Barnes and by what Judge Clark of the Court of Appeals for the Second Circuit so aptly has termed "subconcious pressures of group loyalty"; see *In re Chopak*, 160 F. 2d 886, 888 n. 2 (C. A. 2d 1947), cert. den., 331 U. S. 835 (1947).

Judge Campbell was no doubt also influenced by the passion, prejudice and personal hostility of Johnstone toward respondent. This is not surprising. Indeed, he could not well have avoided such influence, so completely did Johnstone's emotional thinking pervade not only the specifications but the prosecution of the case. The conduct of the trial of this proceeding was wholly in Johnstone's hands. It was not until *nearly a year and a half after the trial was concluded* that the United States District Attorney was appointed additional counsel for the prosecution (Tr. 715, 728). That Johnstone's attitude and conduct throughout the proceeding were influenced by emotional and irrational instability is evidenced by his being declared insane (179 F. 2d at p. 365).

It is indeed an astonishing thing that after respondent with imagination, industry and energy had unearthed and brought to the Court's attention the fraudulent nature of the original bankruptcy proceeding, and had through the reopening proceeding made it possible for the Court to

bring into the administration assets ample to pay all creditors in full, the attorney for the trustee in bankruptcy abandoned his attack on the bankrupt, secretly made a deal with the trustees under the Joslyn trusts for the bankrupt's benefit and then attacked the person (the respondent) who made the full payment of all claims possible.

IV. The Court of Appeals Properly Reviewed the Evidence to Determine Whether or Not as a Matter of Law the Evidence Sustained the Conclusions Drawn from It by the District Court and the Disbarment Order.

In United States District Courts the relations between the courts and members of the bar, and their respective rights and duties, are regulated by the common law.

Ex parte Secombe, 19 How. 9 (U.S. 1856).

Under the common law proof, to support a disbarment order, must be convincing and must include convincing proof of evil intent, bad faith and injury to innocent persons. *This is crucial in this case, as there was no finding whatever of any such evil intent, bad faith or injury by the District Court. This alone justifies the reversal by the Court of Appeals.*

The following are a few of many cases which reiterate this fundamental common law principle:

Davis v. *Chattanooga Union Ry. Co.,* 65 Fed. 359, 368 (C.C.S.D. Tenn. 1895).

In re Baum, 32 Idaho 676, 186 Pac. 927 (1920).

In re O'Keefe, 49 Mont. 369, 142 Pac. 638 (1914).

People v. *Robinson,* 32 Colo. 241, 75 Pac. 922 (1904).

This principle that there can be no lawful disbarment without such proof of evil motive has been recognized in Illinois for over a century.

In re Donaghy, 402 Ill. 120, 135, 83 N.E. 2d 560, 567, (1948).

People v. *McCaskrin,* 325 Ill. 149, 164, 156 N.E. 328, 333 (1927).

In re Lasecki, 358 Ill. 69, 72, 192 N.E. 655, 656-657 (1934).

People v. *Gorindar,* 350 Ill. 256, 260, 182 N.E. 732, 733 (1932).

People v. *A'Brunswick,* 315 Ill. 442, 450, 146 N.E. 483, 486 (1925).

In re Smith, 365 Ill. 11, 17, 5 N.E. 2d 227, 229 (1936).

People v. *Lotterman,* 353 Ill. 399, 410, 187 N.E. 424, 428 (1933).

People v. *Lasley,* 302 Ill. 595, 602, 135 N.E. 50, 53, (1922).

People v. *Ader,* 263 Ill. 319, 325, 104 N.E. 1060, 1062 (1914).

People v. *Hammond,* 356 Ill. 581, 583, 191 N.E. 215, 216 (1934).

In re Brumund, 381 Ill. 139, 144, 44 N. E. 2d 833, 835 (1942).

People v. *Hansen,* 316 Ill. 502, 507, 147 N.E. 431, 433 (1925).

It was proper for the Court of Appeals to review the evidence to ascertain whether or not it satisfied these requirements.

In re Spicer, 126 F. 2d 288 (C. A. 6th 1942).

United States v. *Hicks,* 37 F. 2d 289, 292 (C.A. 9th 1930).

Hertz v. *United States,* 18 F. 2d 52 (C.A. 8th 1927).

Costigan v. *Adkins,* 18 F. 2d 803, 804 (App. D.C. 1927).

Bartos v. *U. S. District Court,* 19 F. 2d 722, 731 (C. A. 8th 1927).

Halpern v. *Committee on Admissions, etc.,* 139 F. 2d 361 (App. D.C. 1943).

If this were not so the right to appeal from such an order would be illusory.

Petitioners' statement (Pet., p. 6) that the Court of Appeals' decision does "gross violence" to Rule 52 (a) ignores the well settled distinction between the finality to be accorded findings of fact and the inferences and conclusions to be drawn from such findings of fact. This distinction is particularly relevant here because, as petitioners recognize, there was no conflict in evidence regarding facts of evidentiary significance.*

This distinction was recognized and applied by this Court in the recent case of *United States* v. *Gypsum Company,* 333 U.S. 364, 394-395, 398 (1948), where the Court said: "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (p. 395)

In *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 F. 2d 704 (C.A. 3rd 1941), the court, in referring to the rule that it could only disturb findings of fact made by the trial court if they were unsupported by evidence or otherwise clearly erroneous, said (pp. 705-6, italics ours):

> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn

* See footnote, p. 13.

> by the trial court from its fact findings. *And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce.* Such was the law prior to the promulgation of the Rules of Civil Procedure . . . . The new Rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular. . . . . *The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. . . . . Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action.* . . . An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

Among the many other cases which have applied the same rule are *Orvis* v. *Higgins,* 180 F. 2d 537 (C.A. 2d 1950); *Murray* v. *Noblesville Milling Co.,* 131 F. 2d 470, 474 (C.A. 7th 1942); *Bach* v. *Friden Calculating Mach. Co.,* 155 F. 2d 361, 364 (C.A. 6th 1946); and *Pacific Portland Cement Co.* v. *Food Machinery and Chem. Corp.,* 178 F. 2d 541, 548 (C.A. 9th 1949).

V. The Decision of the Court of Appeals is Not in Conflict with Any of the Decisions Cited by Petitioners (Response to pp. 7-10 of Petition).

That petitioners' whole argument rests on a misconception of the scope of review of the trial court's decision and of the meaning of Rule 52(a) has been demonstrated. Petitioners' position is apparently based largely on early Supreme Court cases involving entirely different issues. An analysis of the cases cited by petitioners indicates

that none of the cases relied on as being in conflict with the decision of the Court of Appeals in the present case sustains their position.

A. *Analysis of Supreme Court Cases Relied on by Petitioners.*

The cases of *Ex parte Burr,* 9 Wheat. 529. (U.S. 1824), *Ex parte Wall,* 107 U.S. 265 (1882), *Ex parte Secombe,* 19 How. 9 (U.S. 1856), and *Ex parte Bradley,* 7 Wall. 364 (U.S. 1868), all involved applications for writs of mandamus. Mandamus has always been an extraordinary remedy available only in special circumstances and where there is no other adequate remedy. The scope of review by mandamus is limited. An appreciation of this fact is the key to an understanding of the Supreme Court cases relied on by petitioners.

The case of *Ex parte Bradley,* 7 Wall. 364 (U.S. 1868) makes it clear that that case and the *Burr, Wall* and *Secombe* cases were based on the limited scope of review *by mandamus* rather than on the fact that disbarment proceedings were involved. The court pointed out that since orders of disbarment were not reviewable by writ of error, the attorney would be "utterly remediless" unless such orders were reviewable by writ of mandamus.* The court recognized that "this writ does not lie to control the judicial discretion of the judge or court." (p. 377.) However, the court noted that "this decretion is not unlimited" and that "it must be a sound discretion and according to law." (p. 377.)

*Note: Relief by way of a writ of certiorari was theoretically available under Sec. 14 of the Judiciary Act of September, 24, 1789 (1 Stat. 81, c. 20), giving the court power "to issue all writs, not specifically provided for by statute which may be agreeable to the usages and principles of law." However, prior to the Act of March 3, 1891 (26 Stat. 826, c. 517), the power to issue writs of certiorari was not freely used, and ordinarily was used only as an auxiliary process. **In re Chetwood,** 165 U.S. 443, 462 (1897).

It is evident from the opinion in *Ex parte Bradley* that at the time the *Burr, Wall* and *Secombe* cases were decided the Supreme Court did not consider that certiorari was available to review disbarment cases. Even as late as 1914 the government was contending in a disbarment case that mandamus was the only remedy. *Thatcher* v. *United States,* 212 Fed. 801, 804 (C.A. 6th 1914). The Circuit Court of Appeals for the Sixth Circuit properly pointed out that the early Supreme Court disbarment cases were explainable by differences in appellate jurisdiction, which were not applicable to circuit courts of appeals.

The court in the *Bradley* case expressly refused to pass on the proposition for which petitioners have cited that case, remarking as follows:

> "We are not concerned, however, to examine in the present case how far this court would inquire into any irregularities or excesses of the court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. Whatever views may be entertained concerning it they are wholly immaterial and unimportant here." (p. 377.)

The court then went on to hold that a writ of mandamus should issue because the court below was wholly without jurisdiction to disbar the attorney for a contempt committed before another court.

In quoting (Pet., p. 2) from *Ex parte Burr,* 9 Wheat. 529 (U.S. 1824), petitioners omit the really pertinent portion of Chief Justice Marshall's opinion, which expressly states that the Supreme Court could interpose if the lower court "had decided erroneously on the testimony," and emphasizes the great importance of the reviewing

court's power to supervise the discipline administered by lower federal courts. We quote this omitted portion (p. 531):

> " . . . . It could only interpose, on the ground, that the circuit court had clearly exceeded its powers, or had decided erroneously on the testimony. The power is one which ought to be exercised with great caution, but which is, we think, incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession. . . . ."

In *Ex parte Wall,* 107 U.S. 265 (1882), this Court, after reviewing the trial court record in great detail, concluded that there was no question but that the attorney's conduct justified the disbarment order. The attorney's answer in effect had admitted that he participated in a lynching directly in front of the court house door. It rejected the remedy of mandamus (107 U.S. p. 272) but referred to *Ex parte Burr* as recognizing the propriety of a review of the question whether the trial court had "decided erroneously on the testimony" (107 U.S. p. 284).

In *Ex parte Secombe,* 19 How. 9 (U.S. 1856), Chief Justice Taney expressly qualified the very broad language quoted on page 8 of the petition (which if taken literally would mean that at common law no disbarment order could be appealed); stating (p. 15) that it was not necessary "to inquire whether this decision of the Territorial Court can be reviewed here in any other form of proceeding." The decision merely was that the order, being a judicial act, could not be reviewed *by mandamus* "however erroneous it may be."

Ex parte Garland, 4 Wall. 333 (U.S. 1866) is wholly irrelevant on its facts. It did not involve disbarment but merely the question whether Garland (who had previously been a member of the bar of the Supreme Court and been disqualified by adherence to the Confederacy) could, after being pardoned by the President, apply for reinstatement

without taking an oath that he had never borne arms against the United States. There was no question of appellate jurisdiction involved, it being an original proceeding in the Supreme Court. Such portions of the opinion as are at all pertinent are adverse to the contentions of the petitioners and favorable to those of the respondent, as recognizing the fact that a disbarment proceeding is inherently judicial in nature, requiring a valid judgment.

Bradley v. *Fisher,* 13 Wall. 335 (U.S. 1871), and *Randall* v. *Bingham,* 7 Wall. 523 (U.S. 1868), were both civil suits against judges by lawyers disbarred by them, and have no bearing on the present case.

Kingsland v. *Dorsey,* 338 U.S. 318 (1949), involved an entirely different question from that with which the instant proceeding is concerned. There was no question as to the scope of review of an order of disbarment by a district court. The issue concerned the propriety of an order by the Commissioner of Patents, acting under the authority of §487 of the Revised Statutes (35 U.S.C. §11), barring an attorney from practice before the United States Patent Office. The decision of the district court affirming the order of the Commissioner had been reversed by the court of appeals. This Court reinstated the decision of the district court, stating that an examination of the record indicated that the findings were amply supported by substantial evidence. The Court noted that Congress had given the Commissioner rather than the courts the responsibility for passing on the fitness of attorneys appearing in ex parte proceedings before the Patent Office, but even the doctrine of administrative finality was not considered to foreclose a review as to whether the findings were supported by substantial evidence and valid in law.

In so far as this case is relevant at all it supports the contention of respondent in that it clearly recognizes the propriety of a review to determine whether or not findings are supported by substantial evidence and valid in law.

Clearly there is no merit in petitioners' position that the decision of the court below "is directly in conflict with the decisions of this Court."

B. *Analysis of Courts of Appeals Decisions Relied on by Petitioners.*

The decision of the Court of Appeals below is not in conflict with the decisions of the courts of appeals cited by petitioners. In fact, as the following analysis of these cases demonstrates, they support the position of the respondent and not that of petitioners.

In *Tulman* v. *Committee on Admissions and Grievances,* 135 F. 2d 268 (App. D.C. 1943), the court of appeals reviewed the evidence and concluded that the district court had properly exercised its discretionary powers; whereas in the present case the Court of Appeals concluded that the District Court had: 1) entered an order not supported by evidence; and 2) disbarred petitioner without any finding of evil intent or bad faith on the part of the petitioner, and without proof of injury to any person except the fraudulent bankrupt, to whom the respondent owed no duty whatever. The court's language in reference to its power of review is directed to the discretion of the lower court in deciding on the measure of discipline, once it has been determined that the attorney's conduct was improper, rather than to the scope of review as to the findings of fact and the conclusions of law based thereon.

In *Thomas* v. *Ogilby,* 44 F. 2d 890 (App. D.C. 1930), the court of appeals specifically states (p. 892) that there was substantial evidence in support of the charges, and that

therefore there was a proper basis for the judgment of the trial court. Consonantly, in the present case the Court of Appeals found that there was no substantial evidence in support of the charges. The court's language, in reference to review being limited to the determination of whether or not there was an "abuse of discretion", relates to the method of proof rather than to the scope of review of findings of fact (p. 892).

In re Schachne, 87 F. 2d 887 (C.A. 2d 1937), is not in any way inconsistent with the decision in the present case. The court of appeals specifically states in the opinion that there was no abuse of discretion by the trial court; whereas in the present case the Court of Appeals held there was such abuse by holding that the disbarment order was not supported by evidence. This opinion also refers to the fact which we have pointed out above, that the early Supreme Court cases "are explainable by differences in appellate jurisdiction."

Similarly *In re Chopak,* 160 F. 2d 886 (C.A. 2d 1947), is wholly consistent with the present case. There also the court of appeals states (p. 887) that the undisputed facts fully justified the order of disbarment. In the present case, on the other hand, the Court of Appeals held that the evidence did not sustain the order, which, as we have stated, is another way of saying that the trial court abused its discretion. As in the *Tulman* case the reviewing court's language as to the discretion of the lower court refers to the *measure* of discipline imposed. The court remarked that "What measure of discipline should be meted out rested in the sound discretion of the District Court . . . . In the case at bar we can see no abuse of discretion in the discipline imposed." (p. 887)

The case of *In re Claiborne,* 119 F. 2d 647 (C.A. 1st 1941), is for similar reasons consistent with the present case. The opinion specifically states (p. 651) that the court found

no abuse of discretion by the trial court and that there was ample evidence to sustain its order.

In re Spicer, 126 F. 2d 288 (C.A. 6th 1942), is not only consistent with the present case but emphasizes the universally recognized principle that the power to disbar an attorney "should not be exercised except in clear cases of misconduct" (p. 289). The decision also expressly states that the reviewing court should examine the evidence "for the purpose of determining whether it was so incredible that it was an abuse of discretion for the District Court to rely upon it" (p. 289). The case is cited on this very point, with approval, in *In re Patterson*, 176 F. 2d 966, 967 n. (C.A. 9th 1949). This is just what the Court of Appeals did in the present case. The court of appeals in the *Spicer* case reviewed the evidence and concluded that there was no abuse of discretion. The Court of Appeals in the present case likewise reviewed the evidence but concluded that there was abuse of discretion.

In *In re Patterson*, 176 F. 2d 966, the court of appeals reversed the disbarment order on the ground that the evidence did not support it. Thus the case is not only consistent with the present one, but like it.

The foregoing analysis of the cases cited by petitioners as being in conflict with the decision of the court below indicates that petitioners have confused the decisions reached in the cases cited with the process by which the courts arrived at these decisions. Where a court reviews the evidence and decides that the evidence supports the findings of fact and that the findings of fact support the conclusions of law and the order based thereon, this is hardly a holding that the court cannot do precisely what it has done, i.e., review the evidence to determine whether or not it does support the findings of fact and conclusions of law. Whether the court decides in a particular case that there has or has not been an abuse of discretion, is completely

irrelevant. The issue is the scope of review in determining this question. It is clear from petitioners' own cases that the reviewing court is not required to abdicate its function as an appellate tribunal.

VI. There is No Special or Important Reason Within the Meaning of Rule 38, 5(b) of this Court for Granting the Writ of Certiorari in this Case.

This case presents none of the reasons for granting certiorari listed in the rule.

Nor is the case of sufficient general importance to justify a review by this Court. No new principle of law is established by it. The decision of the Court of Appeals does not adjudicate any issues of public significance.

CONCLUSION.

Petitioners' position is essentially that the Court of Appeals could not lawfully review the disbarment order because the determination of the issues was wholly within the trial court's discretion. Yet petitioners recognize that there were no conflicts in the pertinent factual issues. If this be true, as indeed it is, the questions before the Court of Appeals were pure questions of law, reviewable by it. The logic of petitioners' position would mean that no disbarment order is appealable. This obviously is not so; and petitioners themselves do not assert it.

The effect of the disbarment order was to justify the illegal attempt of Judge Barnes and Johnstone to force respondent to fall in line with the proposed illegal settlement either by abandoning his claim or by withdrawing from his position that the bankruptcy court could not adjudicate the claim without first taking possession of the assets. There was no reason why he should abandon his

claim. The Court of Appeals, in the case of *In re Joslyn's Estate,* 168 F. 2d 803 (1948), held that the bankruptcy court had no jurisdiction to adjudicate the lien claim without first taking possession of the assets; and held in the case of *Young* v. *Handwork,* 179 F. 2d 70 (1949), cert. den., 339 U.S. 949 (1950), that the assets were administrable. Thus respondent was shown to be right and Judge Barnes and Johnstone to be wrong. And yet respondent was disbarred.

One would think that a district court, when informed of fraud and perjury in a bankruptcy proceeding, would vigorously pursue the issues, recover the property, and punish the fraudulent bankrupt. Instead, Judge Barnes tried to effect a settlement which would discharge the bankrupt for less than the claims and absolve him from wrongdoing; and turned upon the respondent, to force him to accept a settlement of which the conditions were such, in the words of the Court of Appeals "as to make it doubtful if any court would have approved such proposal even though it had been agreeable to all concerned" (179 F. 2d at p. 368).

It is not surprising that the Court of Appeals reversed the disbarment order, saying (italics ours):

> *"This is a novel and unusual proceeding. Respondent by his industry and energy not only uncovered and exposed but obtained an adjudication that Joslyn's discharge in bankruptcy was fraudulent. With little assistance and much opposition he sought to cause the bankrupt's beneficial interest in the trusts turned over to the bankruptcy Trustee for administration. On three different occasions either the respondent or the position for which he stood has been vindicated by this court and now, ironically enough, he finds himself disbarred for a period of three years, and this without any finding of evil intent or bad faith, and without proof of injury to any person other than the one who has been adjudicated a fraudulent bankrupt. While the heart of the charges made against respondent is*

that he acted in a dual capacity for his own financial benefit, not a single word of complaint has been uttered against him, so far as we know, either as a witness or otherwise, by Mrs. Joslyn or her attorneys, or by the Elks or any of its representatives, or by any creditor of the bankruptcy estate.'' (179 F. 2d at p. 369)

If this disbarment were affirmed, we submit that many lawyers would be fearful that courageous and vigorous resistance to the extra-judicial wishes of the district court might result in disbarment proceedings against them. Within the proper functions of the bar, the independence of the individual lawyer is as important as is the independence of a court in the exercise of its judicial powers. Often a resourceful and energetic lawyer is disliked by judges and fellow members of the bar. Examples which come quickly to mind are Mr. Louis D. Brandeis while practicing at the Boston Bar and Sir Edward Marshall Hall. The very vigor of such men gives strength to our legal system. They should not be at the mercy of a temperamental and impatient judge, particularly where the judge himself is in the wrong.

The disbarment order was properly reversed, and this Court should not grant certiorari.

Respectfully submitted,

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EXHIBIT

(Emphasis added)

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA
October Term, 1949

IN THE MATTER OF THE
PROFESSIONAL CONDUCT OF
THOMAS HART FISHER.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI.

Otto Kerner, Jr., a member of the Illinois bar and of the bar of the United States District Court for the Northern District of Illinois, on behalf of the said bar of the United States District Court for the Northern District of Illinois, hereby respectfully petitions this Honorable Court for an extension of time within which to apply for a writ of certiorari in the above-entitled cause from May 15, 1950 to and including July 14, 1950.

A petition for rehearing was denied by the United States Court of Appeals for the Seventh Circuit in the above-entitled cause on February 14, 1950. The time within which a petition for a writ of certiorari may be filed expires on May 15, 1950. The jurisdiction of this Court rests upon Title 28, United States Code, Section 1254.

In the instant case, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the United States District Court for the Northern District of

Illinois, disbarring the captioned individual. The issue presented is whether in reviewing a disbarment proceeding, the Court of Appeals is limited only to the question of the arbitrariness and capriciousness of the trial court.

As grounds for the requested extension of time, your petitioner states as follows:

1. **Only a few days ago, the Solicitor General of the United States advised the United States District Court for the Northern District of Illinois and your petitioner that he did not deem the circumstances surrounding this case to be such as to warrant participation in the disbarment proceeding by the United States,** and that if an application for certiorari is to be made, it should be filed by your petitioner as the Court's appointed counsel, in his capacity as such counsel.

2. Pressure of other work before the bar of the United States District Court for the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit, and the Supreme Court of the State of Illinois, and a temporary shortage of personnel, make it impossible adequately to present the issue at bar to this Honorable Court prior to the expiration on May 15, 1950 of the normal ninety (90) day period allowed for filing a petition for a writ of certiorari.

Respectfully submitted,

(S) Otto Kerner, Jr.
Otto Kerner, Jr.

C. Wylie Allen
Robert B. Johnstone
John Peter Lulinski
Of Counsel.